

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

APRIL TERM, 1905.

No. 1537.

349

THOMAS O. PROBEY, PLAINTIFF IN ERROR.

v's.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 10, 1905.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1905.

No. 1537.

THOMAS O. PROBEY, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

THOMAS O. PROBEY, Plaintiff in Error, }
 vs. } No. 1537.
 DISTRICT OF COLUMBIA.

a In the Police Court of the District of Columbia, March Term,
1905.

DISTRICT OF COLUMBIA } No. 267,643. Information for Violation of
 vs. }
 THOMAS O. PROBEY. } Police Regulations.

Be it remembered, that in the police court of the District of Columbia, at the city of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 In the Police Court of the District of Columbia, March Term,
A. D. 1905.

THE DISTRICT OF COLUMBIA, ss:

Andrew B. Duvall, Esq., corporation counsel, by James L. Pugh, Jr., Esq., assistant corporation counsel, who, for the District of Columbia, prosecutes in this behalf in his proper person, comes here into court, and causes the court to be informed, and complains that Thomas O. Probey, late of the District of Columbia aforesaid, on the 18th day of March, in the year A. D. nineteen hundred and five, in the District of Columbia aforesaid, and in the city of Washington, on 32nd street, northwest, being then and there the owner of a certain carriage, did unnecessarily obstruct the free passageway of said street with the same, contrary to and in violation of the police regulations of the District of Columbia, and constituting a law of the District of Columbia.

ANDREW B. DUVALL, Esq.,
Corporation Counsel,
By JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared G. H. Laleger, this 21st day of March, A. D. 1905, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

[Seal Police Court of District of Columbia.]

JOSEPH HARPER,
Deputy Clerk of the Police Court of the District of Columbia.

EXHIBIT A.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA	} No. 267,643.
vs.	
THOMAS O. PROBEY.	

Be it remembered the trial of this cause which came on for hearing on the 23rd day of March, A. D. 1905, before the presiding justice, which said hearing, after the testimony herein set forth was given by the District to prove the issues joined on his part, produced as a witness Police Officer WILLIAM W. JORDAN, who testified as follows:

That on the 18th day of March, he passed the carriage repository, bearing the name, Probey, and that he saw a carriage without a horse attached standing in the street in front of the repository, that he told the brother of the defendant to have it moved, that he replied that he would not, that the said carriage stayed there for three hours, and that the defendant owned the carriage.

Thereupon the District rested.

Thereupon the defendant, moved the court to instruct itself as a matter of law, that, "the defendant was not guilty on the information which said charge was that the defendant, in the city of Washington, on 32nd street N. W. being then and there the owner of a certain carriage, did unnecessarily obstruct the free passage way of such street, and hinder and delay the passage of other vehicles with the same," on the ground that the said record failed to show, 1. That the defendant was the owner of the carriage, which is alleged to have obstructed the street, etc.

2. The record failed to show any unnecessary obstruction of said street, or hindrance or delaying the free passageway of vehicles thereon.

3. And for the further reason that a person conducting his business has a right to use the street in front of his place of business in a reasonable manner. But the court overruled said motion, to which ruling counsel for the defendant excepted, which said exception was duly noted at the time — was taken, and notice thereof given of an intention to apply to the Court of Appeals for a writ of error, said exceptions being signed this 25th day of March, A. D. 1905.

CHARLES F. SCOTT, [SEAL.]
Judge of Police Court.

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(Copy of Docket Entire.)

In the Police Court of the District of Columbia, March Term, A. D.
1905.

DISTRICT OF COLUMBIA	}	No. 267,643. Information for Violation of Police Regulations.
vs.		
THOMAS O. PROBEY.		

Defendant arraigned Thursday, March 23, 1905. Plea: Not guilty. Judgment: Guilty. Sentence: To pay a fine of ten dollars, and, in default, to be committed to the workhouse for the term of thirty days.

Exceptions taken to the rulings of the court on matters of law and notice given by the defendant in open court at the time of said rulings of his intentions to apply to a justice of the Court of Appeals of the District of Columbia for a writ of error.

Recognizance in the sum of one hundred dollars entered into on writ of error to the Court of Appeals of the District of Columbia upon the condition that in the event of the denial of the application for a writ of error, the defendant will, within five days next after the expiration of ten days, appear in the police court and abide by and perform its judgment, and that in the event of the granting of such writ of error, the defendant will appear in the Court of Appeals of the District of Columbia and abide by and perform its judgment in the premises. William S. Probey, surety.

March 25, 1905.—Bill of exceptions filed, settled and signed.

March 27, 1905.—Writ of error received from the Court of Appeals of the District of Columbia.

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In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,	}	ss :
<i>District of Columbia,</i>		

I, Joseph Y. Potts, clerk of the police court of the District of Columbia, do hereby certify *that* the foregoing pages, numbered from 1 to 4 inclusive, to be true copies of originals in cause No. 267,643 wherein The District of Columbia is plaintiff and Thomas O. Probey defendant, as the same remain upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, — the city of Washington, in said District, this 10th day — April A. D. 1905.

[Seal Police Court of District of Columbia.]

JOSEPH Y. POTTS,
Clerk Police Court, Dist. of Columbia.

6 Filed Mar. 27, 1905. Joseph Y. Potts, Clerk Police Court, D. C.

UNITED STATES OF AMERICA, ss :

The President of the United States to the Honorable Charles F. Scott, judge of the police court of the District of Columbia, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said police court, before you, between the District of Columbia, plaintiff, and Thomas O. Probey, defendant, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, chief justice of the said Court of Appeals, the 27th day of March, in the year of our Lord one thousand nine hundred — five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—

SETH SHEPARD,
*Chief Justice of the Court of
Appeals of the District of Columbia.*

7 In the Court of Appeals of the District of Columbia.

THOMAS O. PROBEY, Plaintiff in Error,	} No. 1537.
vs.	
THE DISTRICT OF COLUMBIA.	

It is agreed between counsel in the above entitled cause that the following be added to the transcript of record, the same having been inadvertently omitted from the information, by inserting after the

word "same" in line 12 the words, "and thereby hinder and delay the traffic on said street."

CHARLES F. DIGGS,
Att'y for Pl'f in Error.
F. H. STEPHENS,
Att'y for Def. in Error.

(Endorsed:) No. 1437. Thomas O. Probey vs. District of Col. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Apr. 12, 1905. Henry W. Hodges, clerk.

Endorsed on cover: District of Columbia police court. No. 1537. Thomas O. Probey, plaintiff in error, vs. District of Columbia. Court of Appeals, District of Columbia.] Filed Apr. 10, 1905. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA

No. 1,537

No. 12, Special Calendar

THOMAS O. PROBEY,

Plaintiff in Error,

vs.

THE DISTRICT OF COLUMBIA

Brief on Behalf of Plaintiff in Error

CHARLES F. DIGGS,

Attorney for Plaintiff in Error.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

THOMAS O. PROBEY, <i>Plaintiff in Error,</i>	}	No. 1,537.
<i>vs.</i>		
THE DISTRICT OF COLUMBIA.		

BRIEF FOR PLAINTIFF IN ERROR

This is a writ of error to the Police Court of the District of Columbia to review a judgment of that court finding the plaintiff in error guilty on an information against him, charging that, "On the 18th day of March, in the year A. D. 1905, in the District of Columbia, aforesaid, and in the City of Washington, on 32d Street Northwest, being then and there the owner of a certain carriage, did unnecessarily obstruct the free passage way of such street, and thereby hinder and delay the traffic on said street with the same, contrary to and in violation of the police regulations of the District of Columbia,"

The defendant pleaded "not guilty," and the case came on for a hearing; and the District, in order to maintain the issue on its part joined, produced as a witness Police Officer Jordan, who testified as follows :

That on the 18th day of March, he passed the carriage repository, bearing the name of Probey, and that he saw a carriage, without a horse attached, standing in front of the repository, and that he told the brother of the defendant to have it moved, and he replied that he would not ; that the said carriage stayed there for three hours and that the defendant owned the carriage.

Thereupon the District rested.

Thereupon the defendant moved the court to instruct itself, as a matter of law, that the defendant was not guilty of the charges mentioned in the said information, which said charges were that of unnecessarily obstructing the free passageway of the street and hindering and delaying the traffic on said street, on the ground that the record showed no evidence of the fact that the defendant was the owner of the carriage charged in the information, and on the further ground that the record showed no evidence of the unnecessary obstruction of said street or the hindering or delaying of the passageway of the other vehicles thereon; and on the further ground that the said defendant in conducting his business has a right to use the street in front of his place of business in a reasonable manner, but the court overruled said motion, to which ruling of the court an exception was properly noted and the defendant found guilty and fined thirty dollars.

Proper exceptions to the rulings of the court on matters of law were taken, and notice given of an intention to apply to this court for a writ of error, and recognizance entered into as required by the rule of court; and the case comes here now for a review in this court.

ASSIGNMENT OF ERROR.

1. The court erred in holding that the defendant was guilty as a matter of law in unnecessarily obstructing the street, hindering and delaying the free passageway of the other vehicles thereon.

2. The court erred in not holding that the defendant in conducting his business, has a right to use the street in front of his place of business in a reasonable manner.

3. The court erred in not holding that there was no evidence to show any unnecessary obstructing of the street or the hindering or delaying of traffic.

ARGUMENT.

The information in this case was filed under section 14 of Article 10 of the Police Regulations, which reads as follows :

“No vehicle shall unnecessarily obstruct the free passageway of any street or avenue, nor hinder or delay the passage of any other vehicle, etc.”

This court has recently rendered a decision in the case of Samuel Gassenheimer *vs.* The District of Columbia, No. 1489, in which case was involved the same questions as are presented in the case at bar, and as the court in its decision in that case went fully into the subject and cited the leading authorities on the questions involved, it is not deemed necessary to do more than refer to that case.

In the Gassenheimer case, *supra*, the court held, 1st. That the District had failed to show by affirmative testimony that there was an actual hinderance or delay to traffic. 2d. That if there had been such actual obstruction or hinderance, it was not shown that the same was not the result of the plaintiff in error using the street in a reasonable manner for the purposes of his business.

The case at bar is identical with the Gassenheimer case in respect to both of the points above mentioned.

It is respectfully submitted that the record fails to show that the District of Columbia established the guilt of the plaintiff in error, as it introduced absolutely no testimony whatever to show that an offense had been committed, but on the contrary simply showed that a wagon was on the street without showing any injury to traffic as a result. It is, therefore, respectfully submitted that the judgment of the Police Court should be reversed.

CHARLES F. DIGGS,
Attorney for Plaintiff in Error.

Court of Appeals, District of Columbia.

APRIL TERM, 1905.

No. 1537.

No. 12, SPECIAL CALENDAR.

THOMAS O. PROBEY, PLAINTIFF IN ERROR.

v.

DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT.

ANDREW B. DUVALL,
FRANCIS H. STEPHENS,
Attorneys for the District of Columbia.

Court of Appeals, District of Columbia.

APRIL TERM, 1905.

No. 1537.

No. 12, SPECIAL CALENDAR.

THOMAS O. PROBEY, PLAINTIFF IN ERROR,

v.

DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT.

Statement of the Case.

The defendant was tried and convicted in the police court upon an information charging him with unnecessarily obstructing the streets, under the following regulation:

“No vehicle shall unnecessarily obstruct the free passageway of any street, or avenue, nor hinder or delay the passage of any other vehicle” (Art. 10, sec. 14, Police Regulations).

The testimony disclosed that a policeman saw a carriage belonging to the defendant, without a horse attached, stand-

ing in front of a carriage repository bearing the defendant's name; that it remained there for three hours, and the policeman notified the defendant's brother to have it move and the brother said he would not.

There was no evidence introduced on the part of the defendant, who maintained that there was no testimony showing an unnecessary obstruction of the free passageway of the street, that it did not appear that the street was put to an unreasonable use, and that it was not shown that traffic was delayed or hindered.

ARGUMENT.

This case does not involve the question decided in the case of Gassenheimer against the District. In the Gassenheimer case there was an attempt to show an illegal use of the streets for cab purposes; that the defendant used the street in front of his hotel as a public cab stand. There is no such question here; no question of cabs or cab stands. The point here is whether a vehicle, without motive power, standing in the highway for the space of three hours unnecessarily obstructs the free passageway of the street within the meaning of the regulation.

It necessarily results from the manner in which the public highways are customarily used that they may be actually and physically obstructed, or partly so, without infringing upon any regulation passed for the proper regulation of traffic thereon. Such use of the highway, however, must be reasonable and not unduly prolonged, and whether a particular obstruction is illegal should be decided by the circumstances surrounding that case.

15 Am. & Eng. Enc., 491.

Whether a particular use of a highway involves an improper obstruction thereof is generally a question for the jury.

15 Am. & Eng. Enc., 491.

Rex *v.* Ward, 4 Ad. & El., 384.

Rex *v.* Morris, 1 B. & Ad., 441.

Rex *v.* Russell, 6 B. & C., 566.

Burnham *v.* Hotchkiss, 14 Conn., 311.

State *v.* Merritt, 35 Conn., 314.

Zimmerman *v.* State, 4 Ind. App., 583.

Harrison Co. Ct. *v.* Wall, 12 S. W., 130.

Hopkins *v.* Crombie, 4 N. H., 520.

Graves *v.* Shattuck, 35 N. H., 257.

Allegheny *v.* Zimmerman, 95 Pa. St., 287.

“The right of the public to use a highway extends to the whole breadth thereof and not merely to the part which is worked or actually traveled; and consequently an obstruction upon the untraveled part is a proper subject of complaint by the public or persons specially injured. * * * Nor is one justified in obstructing a highway by the fact that he leaves sufficient room for the passage of the public, it being stated that the obstruction is unlawful if the highway is thereby rendered less commodious or convenient for the use of the public.”

15 Am. & Eng. Enc., 493.

1 Hawk, P. C., c. 76, § 48.

Reg. Elec. Tel. Co., 31 L. J. M. C., 166.

State *v.* Mobile, 5 Port. (Ala.), 279.

Hoole *v.* Att’y Gen., 22 Ala., 190.

Burnham *v.* Hotchkiss, 14 Conn., 311.

State *v.* Peckard, 5 Harr., 500.

Com. *v.* R. R., 7 Pa. Super. Ct., 234.

Whether a carriage, without a horse attached, which stands in the highway for three hours constitutes an illegal obstruction seems to be a question of fact for the jury, and the question having been determined against the defendant in the court below, he is precluded from raising that question in this court.

Moreover, the record fails to state that it contains all the evidence, or the substance of all the evidence, produced in the court below pertaining to the issues involved; and this objection is not waived.

Respectfully submitted.

ANDREW B. DUVALL,

FRANCIS H. STEPHENS,

Attorneys for the District of Columbia.

